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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

STATE OF GEORGIA,
Plaintiff,

VS.

STATE OF SOUTH CAROLINA

ON REPORT OF THE SPECIAL MASTER

MEMORANDUM FOR THE STATE OF ALASKA AS AMICUS CURIAE

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MEMORANDUM FOR THE STATE OF ALASKA AS AMICUS CURIAE

The State of Alaska, as amicus curiae, submits this Memorandum in support of neither party to this action, but rather in opposition to remarks made in the Memorandum for the United States as Amicus Curiae ("United States' Memorandum"), filed June 21, 1989, which similarly supports neither party. At the time of the United States' submission, the parties had already filed their exceptions and supporting briefs. This Memorandum is filed within the time set for the parties to file their opposition briefs. Georgia and South Carolina both consent to the filing of this Memorandum.

INTEREST OF THE STATE OF ALASKA

The State of Alaska is before this Court in another action, *United States v. State of Alaska,* No. 84, Original, to determine the extent of submerged lands owned by the State along its North Slope. Three of the specific legal questions before Special Master J. Keith Mann in that case directly concern the United States'

historic policy for delimiting its coast line, including the use of straight baselines under Article 4 of the Convention on the Territorial Sea and the Contiguous Zone ("the Convention"), 15 U.S.T. 1607, T.I.A.S. No. 5639, and the "10-mile rule" described by this Court in the *Alabama and Mississippi Boundary Case*, 470 U.S. 93, 106 (1985), to delimit the seaward limit of inland waters.[1]

Alaska accordingly has a substantial interest in any proceeding before this Court in which the United States' historic practice with respect to coast line delimitation is at issue. While this is not such a case, Special Master Hoffman's brief discussion of Article 4 straight baselines and the more lengthy United States' Memorandum raise matters that bear directly on the issues presented in the *Alaska* case. Alaska therefore has a substantial interest in addressing, as an amicus curiae, certain points made by the United States in its amicus submission.

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[1] This Court described the significance of this determination as follows:

> The Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. §§ 1301 et seq., confirms to each State title to and ownership of the lands beneath navigable waters within the State's boundaries. § 1311(a). The Act also confirms in each coastal State a seaward boundary three geographical miles distant from its coastline. § 1312. . . . The Act defines the term "coast line" as "the line of ordinary low water along that portion of the open sea and the line marking the seaward limit of inland waters." § 1301(c). The first part of this definition is relatively easy to apply. The second part—requiring determination of "the line marking the seaward limit of inland waters"—is more difficult to apply because the term "inland waters" is not defined in the Act.

Alabama and Mississippi Boundary Case, 470 U.S. at 94-95. Straight baselines and the 10-mile rule are two methods for determining "the seaward limit of inland waters." Id. at 99 and 106.

ARGUMENT: THE COURT SHOULD REJECT THE UNITED STATES' SUGGESTED RATIONALE FOR NOT ADOPTING THE SPECIAL MASTER'S STRAIGHT BASELINES DISCUSSION

The United States asserts that Special Master Walter E. Hoffman in his Second and Final Report of Special Master ("Special Master's Report") "assumes, unnecessarily and incorrectly in our view, that the United States has utilized so-called 'straight baselines' in constructing the coast line at the mouth of the Savannah River." United States' Memorandum at 1 (citation to Special Master's Report omitted). The United States then suggests that the Court "indicate in its opinion in this case that it does not adopt that assumption," *id.* at 2, and "that it does not adopt that portion of the Master's discussion." *Id.* at 6. The United States' suggested rationale is that "[t]he use of straight baselines to locate the coast line of the United States is contrary to a longstanding and consistent position of the United States, repeatedly recognized and upheld by this Court." *Id.* at 2; *also see id.* at 4-5.

The State of Alaska respectfully requests that the Court reject this rationale for not adopting that portion of Special Master Hoffman's discussion. Special Master Hoffman makes no reference to the United States' position regarding straight baselines (longstanding or otherwise), and there is no reason for the court to address it here.

More significantly, this Court has not "repeatedly recognized and upheld" the United States' argument that the use of straight baselines is contrary to the United States' "longstanding and consistent" practice. While the United States undoubtedly wishes the Court would reach that conclusion, the Court has carefully avoided doing so, and with good reason: that has not been the United States' "longstanding and consistent" practice.

The submerged lands cases instead establish the following principles: (1) a State may not unilaterally adopt straight baselines to delimit its coast line over the United States' objections where such an extension of State sovereignty necessarily would extend national sovereignty; (2) the United States, on the other

hand, may not abandon the historic use of straight baselines simply to gain an advantage over the States in such cases; (3) whether the United States historically has used a system of straight baselines to delimit its coast line is a question of fact; and (4) from at least 1903 until 1971, the United States "had adopted a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles." *Alabama and Mississippi Boundary Case*, 470 U.S. at 106 (footnote omitted).

I. Any discussion of straight baselines is unnecessary to the decision in this case

As an initial matter, as the United States correctly notes, Special Master Hoffman's straight baselines discussion "is not necessary to his reasoning or conclusions," United States' Memorandum at 3, and is not necessary to the Court's resolution of the issues presented in this case. The Special Master devotes barely two pages of text to the matter of straight baselines, engages in no factual analysis, and seems simply to assume that the Baseline Committee used Article 4 straight baselines to close the water entrance between Tybee Island and Hilton Head Island. Both Georgia and South Carolina accepted the baseline drawn by the Baseline Committee, Special Master's Report at 4-5 and 12, respectively, and the Special Master's discussion of Article 4 thus is of no consequence to the issues in the case and is unnecessary to his ultimate decision.[2] That should end the matter.

Because the Special Master's abbreviated discussion of straight baselines is unnecessary to the decision in this case, the Court should not address that issue. Any analysis of the United States' historic coast line delimitation practice—whether it be Article 4 straight baselines, the 10-mile rule described in the *Alabama and*

[2] Indeed, it would appear that the closing line between Tybee Island and Hilton Head Island could also be justified as a river closing line under Article 13, a possibility suggested in the Exceptions of the State of Georgia at 45, or a bay closing line under Article 7, the ground it is asserted was actually relied on by the Baseline Committee. Id. at 60 n. 39.

Mississippi Boundary Case, or some other method—should await a proper case in which that question is actually presented.

As noted above (and as recognized by the United States, United States' Memorandum at 5-6), that question is squarely presented in the *Alaska* case. Indeed, Alaska introduced evidence at trial that the 10-mile rule is merely a very conservative application of the principles and methods embodied in Article 4 of the Convention, that the United States would have adopted a system of straight baselines for the purpose of delimiting portions of its coast line but for the effect that would have had on Submerged Lands Act litigation with the several coastal States, and that the United States inevitably will adopt a system of straight baselines in the foreseeable future.

In short, this case is not an appropriate one for this Court to address the United States' historic coast line delimitation practice. Any such discussion should await a case such as the pending *Alaska* case in which the issue is squarely presented and fully developed both at trial and in the briefs before the Special Master.

II. This Court has never concluded that the use of straight baselines is contrary to the United States' historic maritime boundary delimitation practice; indeed, the Court has recognized the United States' historic policy of enclosing as inland waters those areas between the mainland and islands less than ten miles apart

The United States substantially overstates the thrust of this Court's decisions when it asserts that "[t]he use of straight baselines to locate the coast line of the United States is contrary to a longstanding and consistent position of the United States, repeatedly recognized and upheld by this Court." United States' Memorandum at 2. The Court, it is true, has given substantial deference—some say inordinate deference[3]—to the United

[3] "It is apparent from a review of the submerged lands issues in light of the identified factors that deference should play no role in these cases." J. Charney, Judicial Deference in the Submerged Land Cases, 7 Vand. J. Trans. L. 383, 454 (1974). Professor Charney's conclusion is

States' position in the submerged lands cases. This has never amounted, however, to wholesale acceptance by the Court of the United States' contentions.

In *United States v. California,* 381 U.S. 139, 168 (1965), for example, the Court held that "California may not use such baselines to extend our international boundaries beyond their traditional international limits against the expressed opposition of the United States." At the same time, the Court strongly suggested that the United States could not abandon the use of straight baselines simply to reduce a State's submerged lands grant:

> The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable.

Id.

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all the more noteworthy in light of his unique perspective on these domestic submerged lands cases. He is a former Chief of the Marine Resources Section, Land and Natural Resources Division, United States Department of Justice. *Id.* at 384. Special Master Hoffman noted that, "[u]pon his graduation from law school, he was employed by the [United States] Department of Justice specializing in ocean boundary matters, and he enumerated various cases in which he was the active trial counsel or perhaps served only as a consultant." Special Master's Report at 24. In addition to his other qualifications noted by Special Master Hoffman, *id.* at 24-25, Professor Charney was qualified in No. 84, Original, as Alaska's expert with respect to international law and the law of the sea, particularly as to the United States' foreign policy and interests, without objection by the United States. (Then-Deputy Solicitor General Louis F. Claiborne, no stranger to these proceedings, stated: "Inasmuch as I fear that Mr. Charney may say some objectionable things, we have no objections to his qualifications." Transcript of Proceedings, Vol. XXI at 3037.) Professor Charney's conclusion that "deference should play no role in these cases" is shared by the author of Note, A Jurisprudential Problem in the Submerged Lands Cases: International Law in a Domestic Dispute, 90 Yale L. J. 1651, 1666-1668 (1981).

Four years later, in *United States v. Louisiana,* 394 U.S. 11, 72-73 (1969), this Court similarly declined to rule that Louisiana could use straight baselines over the United States' opposition. The Court made clear, however, that the question of the United States' historic practice with respect to coast line delimitation is a factual one, and that it did "not intend to preclude Louisiana from arguing before the Special Master that, until this stage of the lawsuit, the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention on the Territorial Sea and the Contiguous Zone." *Id.* at 74 n. 97. The Special Master concluded only that none of the five specific actions pointed to by Louisiana constituted a system of straight baselines under the principles and methods embodied in Article 4. Report of Walter P. Armstrong, Jr., Special Master, *United States v. Louisiana,* No. 9, Original (July 31, 1974), at 5-13. Louisiana's exceptions to the Special Master's Report were overruled by this Court without comment. *United States v. Louisiana,* 420 U.S. 529, 530 (1975).

Other States were not deterred by Louisiana's failure to meet its burden of proof and took up the fight where Louisiana left off. In the *Alabama and Mississippi Boundary Case,* the Court concluded unanimously that evidence presented by those two States showed that "the United States had adopted a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles," and that "[t]his 10-mile rule represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903" until 1971. 470 U.S. at 106-107.

In No. 84, Original, Alaska has adduced substantially more evidence on this score, showing that the policy extends back at least to 1863 and Secretary of State William H. Seward (coincidentally more famous for "Seward's Folly," the 1867 purchase of Alaska from Russia). More importantly, the foregoing developments are taken to their logical conclusion in the pending *Alaska* case. As noted above, evidence in that case demonstrates that the 10-mile rule is merely a very conservative application of the principles and methods embodied in Article 4 of the Convention,

that the United States would have adopted a system of straight baselines for delimiting portions of its coast line but for the effect that would have had on Submerged Lands Act litigation with the States, and that the United States inevitably will adopt a system of straight baselines in the foreseeable future.

The Court should reject the United States' suggested rationale for not adopting the straight baseline portion of the Special Master's Report. That suggestion—that "[t]he use of straight baselines to locate the coast line of the United States is contrary to a longstanding and consistent position of the United States, repeatedly recognized and upheld by this Court," United States' Memorandum at 2—simply is not true.

CONCLUSION: THE COURT SHOULD NOT ADOPT THE STRAIGHT BASELINES PORTION OF THE SPECIAL MASTER'S REPORT SIMPLY BECAUSE IT IS UNNECESSARY TO DO SO

For the foregoing reasons, this Court should not address the United States' historic practice for delimiting its coast line in this proceeding. While Alaska agrees with the United States that the Court need not adopt the straight baselines portion of the Special Master's Report, the appropriate ground for doing so is because it is unnecessary to the final decision in this case. Nothing more need—or should—be said.

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